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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1947
No. 37 Misc.

HENRY HAWK, PETITIONER,

V.

JAMES M. JONES, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA, RESPONDENT.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI.

WALTER R. JOHNSON,
Attorney General of Nebraska,
C. S. BECK,
Deputy Attorney General of Nebraska,
ROBERT A. NELSON,
Assistant Attorney General of Nebraska,
Counsel for Respondent.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

The petitioner in this case is asking that a writ of certiorari issue out of this court to review a judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above cause on the 18th day of April, 1947, which affirmed a judgment of the United States District Court for the District of Nebraska, Lincoln Division, dismissing a petition for a writ of habeas corpus on the ground that the court was without jurisdiction in the matter because of the fact that petitioner had not exhausted his remedies in the state courts.

OPINIONS OF THE COURTS BELOW.

The opinion of the district court is reported in *Hawk* v. *Olson*, 66 Fed. Supp. 195, and that of the circuit court of appeals in *Hawk* v. *Jones*, 160 Fed. (2d) 807.

NATURE AND STATEMENT OF THE CASE.

Introduction.

In this action the appellant, who will in this brief be referred to as the petitioner, sought release from the Nebraska State Penitentiary on a writ of habeas corpus by filing his petition in the District Court of the United States for the District of Nebraska, Lincoln Division (R. 10-21). Petitioner also requested that counsel be appointed to represent him; he further requested that he be permitted to proceed in forma pauperis and supported this request by an affidavit (R. 2-4).

On the 26th day of March, 1946, an order was entered granting him leave to file his petition without prepayment of clerk's fees or court costs and appointing an attorney to represent him. Said order further required

the respondent to show cause why a writ of habeas corpus should not be issued (R. 5-7).

On the 15th day of April, 1946, respondent filed his showing in opposition to the issuance of the writ (R. 24-27), and on the 23rd day of April petitioner filed a counter-showing in opposition to respondent's showing of cause (R. 35-38). On the 26th day of April, 1946, an order was entered granting a writ of habeas corpus, returnable on the 29th day of April, 1946 (R. 40). On the 29th day of April, 1946, respondent filed his return to the writ of habeas corpus (R. 45-46). On the 1st day of May parties appeared in open court, and at the request of petitioner the cause was set for trial upon its merits on June 12, 1946 (R. 48).

Prior to said hearing, the court on its own motion raised the question of the jurisdiction of the court to hear the cause insofar as said question rested upon the exhaustion by the petitioner of the remedies afforded to him under the laws of Nebraska (R. 58,59). Counsel for petitioner and counsel for respondent submitted briefs with reference to the jurisdictional question, and oral arguments were presented to the court on the 4th day of June, 1946 (R. 61). On the 5th day of June an order was entered dissolving the writ of habeas corpus and dismissing the action for want of jurisdiction (R. 76), which order was supported by a memorandum opinion (R. 62-75).

On the 4th day of September, 1946, an order was entered allowing Certificate of Probable Cause and Appeal to the United States Circuit Court of Appeals, Eighth Circuit (R. 78,79). On the 18th day of October, an order was entered by the United States Circuit Court

of Appeals, Eighth Circuit, allowing petitioner to prosecute his appeal in that court as a poor person, without prepayment of fees or costs (R. 89).

On the 9th day of January, 1947, the cause was submitted on the transcript of the record from the district court and the briefs for the respective parties (R. 90). An order was entered substituting James M. Jones, warden, Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, as party appellee in the place and stead of Neil Olson, warden, etc., on the 4th day of March, 1947 (R. 91). On the 18th day of April, 1947, an order was entered affirming the order of the district court dismissing the application for writ of habeas corpus (R. 93), which order was supported by an opinion (R. 92). On the 2nd day of May, 1947, petitioner filed a petition for rehearing (R. 94-98), and on the 19th day of May, 1947, an order was entered denying the petition for rehearing (R. 99).

On the 19th day of May, 1947, the petitioner moved to stay the issuance of the mandate for ninety days pending a petition to the Supreme Court of the United States for a writ of certiorari (R. 99), and on the 23rd day of May an order was entered staying issuance of the mandate (R. 100).

On the 4th day of June, 1947, petitioner moved for an order directing the clerk of the court to prepare, without prepayment of fees or costs, a complete record for filing in the Supreme Court of the United States (R. 100-102), and on that day an order was entered directing the clerk to prepare the transcript of the record, without prepayment of fees and costs, for filing with a petition for writ of certiorari (R. 103).

The Petition.

Petitioner, who is serving a life sentence for murder, alleges errors in his trial and conviction which, he contends, constitute a violaton of his constitutional rights. Briefly summarized, the grounds set forth in the petition which petitioner asserts entitle him to the writ are as follows:

1. Petitioner was deprived of effective assistance of counsel.

2. His conviction was based upon perjured testimony, to the knowledge of the trial judge and prosecuting officers.

3. The evidence was insufficient to support a conviction.

4. Errors in the instructions given by the court.

5. Petitioner was denied an appeal to the Supreme Court of Nebraska.

6. At the time of his trial he was a federal prisoner, incarcerated in the federal penitentary at Leavenworth, Kansas, and after his conviction he was transferred to Alcatraz penitentiary and upon completion of his sentence was turned over to Nebraska authorities, who placed him in the state penitentiary.

Previous Remedies Sought by Petitioner.

Previous to the institution of the present action, petitioner has filed numerous applications for a writ of habeas corpus in the district court for the State of Nebraska, the United States District Court, and the United States Circuit Court of Appeals and has attempted to

file petitions directly in the Supreme Court of the State of Nebraska and the Supreme Court of the United States. At no time, however, has he made application for a writ of error coram nobis.

It will be unnecessary to review all of the actions brought by petitioner, and we will refer, therefore, only to the last action brought in the state courts, wherein he filed his petition in the District Court of Lancaster County, which petition was dismissed without a hearing. This action of the lower court was sustained by the Supreme Court of Nebraska, the opnion being found in *Hawk* v. *Olson*, 145 Neb. 306, 16 N. W. (2d) 181. The Supreme Court of the United States granted certiorari and reversed the Nebraska court, holding that petitioner was entitled to a hearing on his claimed violation of the due process clause of the federal constitution. Upon receipt of the mandate the Nebraska Supreme Court in an opinion reported in *Hawk* v. *Olson*, 146 Neb. 875, 22 N. W. (2d) 136, recognized that the state was bound by the ruling of the United States Supreme Court, but held that it was for the state court to determine the remedy and that habeas corpus was not the proper remedy in Nebraska.

QUESTION PRESENTED.

The sole question presented is whether or not petitioner has exhausted his state remedies so as to grant jurisdiction to the federal court.

SUMMARY OF POINTS AND ARGUMENT.

Point A. An application for habeas corpus by one confined under a state court judgment of conviction for

a crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state court and in the United States Supreme Court, by appeal or writ of certiorari, have been exhausted, and even then it should only be granted in the exercise of a sound discretion in rare cases where exceptional circumstances of peculiar urgency are shown to exist.

Point B. In a case for the protection of a right or prevention of a wrong for which the Code does not provide the common-law writ of error coram nobis is available in Nebraska so far as necessary to prevent a failure of justice.

Point C. The supreme court of a state has the right to determine the availability of a particular remedy sought to be used by one imprisoned under state law.

ARGUMENT.

In view of the ruling of this court in *Hawk* v. *Olson*, 66 S. Ct. 116, 326 U. S. 271, 90 L. Ed. 61, we concede that petitioner is entitled to a hearing in the state courts upon his claim that he was denied the effective assistance of counsel and that his conviction was based upon perjured testimony, to the knowledge of the trial judge and prosecuting officers, provided he seeks the proper remedy. If the state courts provide a remedy, the courts of the United States are without jurisdiction to hear the cause.

Point A.

An Application for Habeas Corpus by One Confined Under a State Court Judgment of Conviction for a Crime Will be Entertained by a Federal Court Only After All State Remedies Available, Including All Appellate Remedies in the State Court and in the United States Supreme Court, by Appeal or Writ of Certiorari, Have Been Exhausted, and Even Then it Should Only be Granted in the Exercise of a Sound Discretion in Rare Cases Where Exceptional Circumstances of Peculiar Urgency Are Shown to Exist.

While the Supreme Court of the United States has ruled that federal courts may entertain jurisdiction in an application for a writ of habeas corpus where federal constitutional rights have been denied to the petitioner in his trial in the state courts, it has never held that the federal courts may entertain such jurisdiction, unless all available remedies in the state courts have been exhausted. In a previous action brought by this petitioner *Ex parte Hawk*, 64 S. Ct. 448, 321 U. S. 114, 88 L. Ed. 572, the court said:

> "From our examination of the papers presented to us we cannot say that he is not entitled to a hearing on these contentions, Walker v. Johnston, 312 U. S. 275, 284-287, 85 L. ed. 830, 834-836, 61 S. Ct. 574; Holiday v. Johnston, 313 U. S. 342, 350, 85 L. ed. 1392, 1396, 61 S. Ct. 1015; Waley v. Johnston, 316 U. S. 101, 104, 105, 86 L. ed. 1302, 1304-5, 62 S. Ct. 964; Cochran v. Kansas, 316 U. S. 255, 258, 86 L. ed. 1453, 1455, 62 S. Ct. 1068. But, as was pointed out by the District Court and Circuit Judge, petitioner has not yet shown that he has exhausted the remedies available to him in the state

courts, and he is therefore not at this time entitled to relief in a federal court or by a federal judge.

"So far as appears, petitioner's present contentions have been presented to the state courts only in an application for habeas corpus filed in the Nebraska Supreme Court, which it denied without opinion. From other opinions of that court it appears that it does not usually entertain original petitions for habeas corpus, but remits the petitioner to an application to the appropriate district court of the state, from whose decision an appeal lies to the state Supreme Court, Williams v. Olson, 143 Neb. 115, 8 N. W. (2d) 830, 831; see Re White, 33 Neb. 812, 814, 815, 51 N. W. 287. From that court the cause may be brought here for review if an appropriate federal question is properly presented.

"Of this remedy in the state court petitioner has not availed himself. Moreover, Nebraska recognizes and employs the common-law writ of error coram nobis which, in circumstances in which habeas corpus will not lie, may be issued by the trial court as a remedy for infringement of constitutional right of the defendant in the course of the trial, Carlsen v. State, 129 Neb. 84, 94-98, 261 N. W. 339. Until that remedy has been sought without avail we cannot say that petitioner's state remedies have been exhausted."

In spite of this opinion and in spite of the fact that the Nebraska court in *Hawk* v. *Olson*, 145 Neb. 306, 16 N. W. (2d) 181, stated that if sufficient facts were alleged to sustain the contentions of petitioner his remedy was not through habeas corpus but through writ of error coram nobis, petitioner has failed and refused to make application to the trial court for such writ. Until such application has been made and an appeal taken to the Supreme Court of Nebraska, together with an applica-

tion for certiorari to the Supreme Court of the United States, federal courts cannot entertain jurisdiction. Even where all state remedies have been denied, the federal courts are reluctant to accept jurisdiction and have held that such jurisdiction should be assumed, in the exercise of a sound discretion, only in rare cases where exceptional circumstances of urgency are shown to exist.

In *United States ex rel. Kennedy* v. *Tyler,* 46 S. Ct. 1, 269 U. S. 13, 70 L. Ed. 138, the Supreme Court said:

> "The rule has been firmly established by repeated decisions of this court that the power conferred on a federal court to issue a writ of habeas corpus to inquire into the cause of the detention of any person asserting that he is being held in custody by the authority of a state court in violation of the Constitution, laws or treaties of the United States, is not unqualified, but is to be exerted in the exercise of a sound discretion. The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist. Ex parte Royall, 117 U. S. 241, 250-253; In re Wood, 140 U. S. 278, 289; In re Frederich, 149 U. S. 70, 77-78; New York v. Eno, 155 U. S. 89, 98; Whitten v. Tomlinson, 160 U. S. 231, 240-242; Baker v. Grice, 169 U. S. 284, 290; Tinsley v. Anderson, 171 U. S. 101, 104-105; Davis v. Burke, 179 U. S. 399, 401-403; Riggins v. United States, 199 U. S. 547, 549; Drury v. Lewis, 200 U. S. 1, 6; Glasgo v. Moyer, 225 U. S. 420, 428; Johnson v. Hoy, 227 U. S. 245, 247."

In *Palmer* v. *McCauley,* 103 F. 2d 300, the United States Circuit Court of Appeals for the Ninth Circuit stated the rule as follows:

"We need not go into the merits of the controversy for it is well settled that whether or not a federal court will issue a writ of habeas corpus to release a prisoner held under a commitment from a state court is one of discretion. Ex parte Royall, 117 U. S. 241, 6 S. Ct. 734, 29 L. Ed. 868; Ex parte Fonda, 117 U. S. 516, 6 S. Ct. 848, 29 L. Ed. 994; Wood v. Brush, 140 U. S. 278, 11 S. Ct. 738, 35 L. Ed. 505. That discretion should be exercised in the light of the principles announced by the Supreme Court in Urquhart v. Brown, 205 U. S. 179, 27 S. Ct. 459, 51 L. Ed. 760, wherein it is held that the appropriate way to raise questions involving the validity of a commitment under a state law is by application to the state courts, and if denied by appeal to the Suprmee Court of the United States, Ex parte Melendez, 9 Cir., 1938, 98 F. 2d 791; Ex parte Penney, 9 Cir., 103 F. 2d 27, March 24, 1939. There are no exceptional circumstances involved in the instant case which would justify the interposition of the District Court."

The opinion in the case of *Woods* v. *Neirstheimer,* 66 S. Ct. 996, 328 U. S. 211, 90 L. Ed. 1177, was the authority which prompted the district court to dismiss the petition in the instant case. In his opinon Judge Delehant most ably discusses the facts and law of said case and its analogy to the instant case as follows:

"* * * Woods had been convicted in an Illinois state court in 1940 under an indictment for murder to which he had entered a plea of guilty. In 1945 he had addressed two separate petitions for writs of habeas corpus to different Illinois trial courts, one apparently being the court by which he was sentenced, the other having jurisdiction over the place of his confinement. The latter court denied a writ for want of jurisdiction and failure to state a cause of action. The former court dismissed upon motion

for failure to state a cause of action. No right of appeal from such orders existing in Illinois, certiorari was granted by the Supreme Court of the United States to review both orders, and its allowance was placed upon a declared doubt whether the dismissals rested on an adequate state ground. In Illinois, it is held that habeas corpus is not the proper remedy for relief against a sentence violating the requirement of due process of law in the manner alleged by Woods. With no little similarity to the petitioner's allegations, Woods claimed cruelty and oppression in the extortion from him of a confession, want of counsel, the appearance for him as counsel of a public defender, the latter's refusal to consider his claimed defense or the circumstances of the confession, threats of Woods' electrocution made by the defender and the prosecutor as a means of subduing him, a plea of guilty by the defender despite Woods' consistent protestations of innocence, and his unwavering refusal to assent to a plea of guilty. Upon its examination of the cases, the Supreme Court concluded, despite inadequate explanation by the several trial courts with respect thereto, that their judgments undoubtedly rested upon the ground that in Illinois habeas corpus is not the proper remedy for the relief sought under the allegations made by Woods. Because that is an adequate state ground for judgment, it denied review and dismissed the writs.

"In that case the warden contended that, by statute in Illinois, the relief which Woods sought must be obtained through a statutory substitute for the common law writ of error coram nobis. To which Woods replied that the writ was not available to him, since, by the statute creating it, recourse to it must be had within five years after the rendition of the judgment of conviction, and that period had elapsed. Reflecting upon the impact of that

situation on the jurisdiction of the federal courts, the Supreme Court said,

> " 'Nor do the denials of petitioner's applications for habeas corpus present a federal question merely because the five-year statute of limitations on the statutory substitute for the writ of error coram nobis has expired. Petitioner claims that this leaves him without any remedy in the state courts. But we do not know whether the state courts will construe the statute so as to deprive petitioner of his right to challenge a judgment rendered in violation of Constitutional guarantees where his action is brought more than five years after rendition of the judgment. Nor can we at this time pass upon the suggestion that the Illinois statute so construed would itself violate due process of law in that a denial of that remedy, together with a denial of the writ of habeas corpus, would, taken together, amount to a complete deprivation of a state remedy where Constitutional rights have been denied. We would reach that question only after a denial of the statutory substitute for the writ of error coram nobis based on the statute of limitations had been affirmed by the Supreme Court of the state.'

"The pertinence of that language to the present jurisdictional problem of this court is inescapable. In effect, it is an admonition against the assumption of doubtful jurisdiction and a warning that Ex parte Hawk, supra, is to be followed literally in its postponement of jurisdiction of the federal courts over the petitioner's grievances until he shaall have pursued in the District Court of Douglas County, Nebraska, through the Nebraska Supreme Court, and even, upon certiorari, through the Supreme Court of the United States, his quest of relief under a

writ of error coram nobis and under any statutory provision for his relief which may exist.

"The court here is persuaded that the plight of Woods, in the face of the explicit prescription of limitation by the law of Illinois, far more convincingly than that of Hawk in view of Nebraska's dubious remedial procedure (vide supra) pleaded for indulgence in the relaxation of the requirements for the presentation of a federal question and the opening of federal jurisdiction. Yet, the Supreme Court of the United States was firm in its insistence that Illinois declare its own position upon Woods' resort to its courts, and disclose, if it must, its procedural inadequacy for the redress of his grievance, and in its refusal to speculate upon those problems, despite the strong probabilities adversely confronting Woods. This court may not be more hospitable in the bestowal of its jurisdiction than is warranted by the admonitory counsel of the nation's highest court. To do so would be gratuitous presumption."

The Woods case cannot be escaped, and in the light of this authority the district court could not do otherwise than dismiss this petition.

Point B.

In a Case for the Protection of a Right or Prevention of a Wrong for Which the Code Does Not Provide, the Common-law Writ of Error Coram Nobis is Available in Nebraska so far as Necessary to Prevent a Failure of Justice.

Petitioner asserts that the Supreme Court of Nebraska has knowingly deprived him of due process of law and the lower federal courts have compounded the injustice because these courts have held that he should resort to

the writ of error coram nobis, a remedy which he assails as a recondite trap and an outmoded procedure. The conclusion of the petitioner is that as a result he is left remediless in the state courts of Nebraska, as he says that the Supreme Courts of the United States and of Nebraska have held that he is barred by the statute of limitations and the decisions of the courts of Nebraska from obtaining relief by writ of error coram nobis.

These statements and conclusions of the petitioner are misstatements and misapplications of fact and of law. Section 49-101, Revised Statutes of Nebraska, 1943, provides as follows:

> "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be law within the State of Nebraska."

And Section 25-2224, R. S. 1943, provides:

> "If a case ever arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this code, the practice heretofore in use may be adopted so far as may be necessaary to prevent a failure of justice."

In *Carlsen* v. *State*, 129 Neb. 84, 261 N. W. 339, and *Newcomb* v. *State*, 129 Neb. 69, 261 N. W. 348, the Supreme Court of Nebraska held that the above-quoted section retained the common-law writ of error coram nobis in Nebraska. These cases have never been reversed and are still the law of the state. It is argued by petitioner that the amendment to Sec. 29-2103, R. S.

1943, adopted by the Nebraska State Legislature the day following the filing of the two above-mentioned opinions had the effect of abolishing the writ of error coram nobis in that it extended the time for filing a motion for a new trial on the grounds of newly discovered evidence from three days to three years after the date of the verdict. Judge Delehant in his opinion herein, suggests that the concurrent pendency of the Carlsen and Newcomb cases in the Nebraska Supreme Court occasioned the action of the legislature then in session. We take issue with this statement, however, and suggest that the adoption of this amendment was prompted by the holding of the court in the case of *Flannigan* v. *State*, 127 Neb. 644, 256 N. W. 323, filed September 21, 1934, that in a criminal case a motion for a new trial, based on newly discovered evidence, must be filed in the same term of court in which the verdict is rendered. Also, the Supreme Court of Nebraska has since said amendment again expressly held that the writ is still available in the state. In petitioner's own case, *Hawk* v. *Olson*, 145 Neb. 306, 16 N. W. 2d 181, the court said:

> "The petitioner refers to the testimony of certain witnesses as being perjured and other witnesses as having been intimidated or bribed. These statements are mere conclusions. They do not set forth facts which, if true, would entitle him to relief. However, if sufficient facts were set forth to entitle him to relief on this basis his remedy would not be by habeas corpus. The writ of error *coram nobis* has been recognized in this state. Carlsen v. State, supra. * * *"

Not only has the Supreme Court of Nebraska called petitioner's attention to the fact that his remedy is

through application for a writ of error coram nobis, but this court in *Ex parte Hawk,* supra, has said:

> "Moreover, Nebraska recognizes and employs the common-law writ of error coram nobis which, in circumstances in which habeas corpus will not lie, may be issued by the trial court as a remedy for infringement of constitutional right of the defendant in the course of the trial, Carlsen v. State, 129 Neb. 84, 94-98, 261 N. W. 339. Until that remedy has been sought without avail we cannot say that petitioner's state remedies have been exhausted."

Petitioner's argument to the contrary, this holding was not changed by the case of *Hawk* v. *Olson,* 66 S. Ct. 116, 326 U. S. 271, 90 L. Ed. 61. It was said there that the allegations of fact, if true, set out a violation of the Fourteenth Amendment and that the petitioner was entitled to an opportunity to prove his allegations.

Nor has the Supreme Court of Nebraska held that the petitioner is remediless in the state courts. That court pointed out that the petitioner's criminal sentence cannot be reached by habeas corpus on the basis of the questions indicated by the United States Supreme Court. *Hawk* v. *Olson,* 146 Neb. 875, 22 N. W. 2d 136. The Nebraska court has not indicated that the writ of error coram nobis would be a useless remedy or a recondite trap. In a case decided this year, *Swanson* v. *State,* 148 Neb. 155, 26 N. W. 2d 595, the court considered an application for a writ of error coram nobis. The applicant had been convicted of the crime of murder in the first degree, was sentenced to life imprisonment in the state penitentiary, and was committed December 5, 1939. The plaintiff did not file his application until July 31, 1946; yet no objection was made by the court

concerning the lapse of time of more than six and one-half years.

Reference was also made in the petition to *Newcomb* v. *State*, supra. There it was held because of the provisions of Sections 20-2001 and 20-2008, Compiled Statutes of Nebraska, 1929 (Secs. 25-2001 and 25-2008, R. S. 1943), that one who seeks by writ of error coram nobis to vacate or modify a judgment against him on the ground that he was of unsound mind must begin proceedings for the writ within two years after the disability was removed. This case, then, is not authority for the statement that an application for writ of error coram nobis must be brought within two years of the date of judgment.

Further, Art. I, Sec. 13, of the Constitution of Nebraska provides:

> "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

To say that habeas corpus will not lie is then no basis for the argument that petitioner is without a remedy. Petitioner has never applied for writ of error coram nobis. The constitutional provision indicates that the state cannot fail to provide a corrective judicial process to remedy the deprivation of his rights.

Three articles by Professor Lester B. Orfield of the University of Nebraska law school faculty, in 20 Virginia Law Review 423, 10 Nebraska Law Bulletin 314, and 11 Nebraska Law Bulletin 421, are cited with approval by the court in the opinion in the Carlsen case. In his

article in 10 Nebraska Law Bulletin, on pages 318 and 319, Professor Orfield discusses the scope of the writ (which has been considerably broadened by the courts of the United States) as follows:

> "The criminal cases on the scope of the writ often merely recite the instances where the writ is appropriate in civil situations. The writ has also been held to lie in certain other typical situations. In the days of slavery it was held to lie to release a slave imprisoned in the state penitentiary, slaves not being subject to such imprisonment. It has also been allowed to release a person under eighteen years of age from the state prison, such persons not being subject to that kind of imprisonment. A number of cases grant the writ where the defendant was insane at the time of judgment. One of the most important cases of its application is that where the defendant was forced through well founded fear of mob violence to plead guilty. This rule was first laid down in an early Indiana case, and has been followed in leading Kansas decisions. It has been repeated as dictum by numerous other courts. An interesting problem might arise if the defendant sought the writ on the ground of duress on the part of officers of the law—would the writ lie on the ground of the use of the third degree?"

To what extent the writ is available in Nebraska has never been determined. At page 98 of the Nebraska Reports, page 346 of the North Western Reports, the opinion in the Carlsen case states:

> "In order to decide this case, it is necessary to determine the scope of the writ of error *coram nobis* only so far as applicable herein. * * *"

Until the Supreme Court of Nebraska has said that the matters raised by petitioner are not justiciable in a coram nobis proceeding, the federal court is without jurisdiction.

Point C.

The Supreme Court of a State Has the Right to Determine the Availability of a Particular Remedy Sought to be Used by One Imprisoned Under State Law.

In its opinion in the case of *Hawk* v. *Olson*, 146 Neb. 875, 22 N. W. 2d 136, the Supreme Court of Nebraska, denying to petitioner a relief by way of habeas corpus, implies that a remedy is available. The court states as follows:

> "The issue here now is the same as it was when the case was initially before us, and that is, what issues are justifiable in an application for a writ of habeas corpus in the courts of this state. That question is for the courts of this state to decide. We have the undoubted right to decide upon our own jurisdiction and the jurisdiction of the courts of this state to which our appellate power extends. Davis v. Packard, 8 Peters 312; Johnson v. Radio Station WOW, *ante* p. 429, 19 N. W. 2d 853. The Supreme Court of the United States has said: '* * * the State may supply such corrective process as to it seems proper.' Frank v. Mangum, 237 U. S. 309, 335, 59 L. Ed. 969, 983, 35 S. Ct. 582, 590."

In the case of *Carter* v. *People of the State of Illinois*, 67 S. Ct. 216, 218-219, the court said with reference to the discretionary power of the states:

> "But the Due Process Clause has never been perverted so as to force upon the forty-eight States a

uniform code of criminal procedure. Except for the limited scope of the federal criminal code, the prosecution of crime is a matter for the individual States. The Constitution commands the States to assure fair judgment. Procedural details for securing fairness it leaves to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures. Brown v. State of New Jersey, 175 U. S. 172, 175, 20 S. Ct. 77, 78, 44 L. Ed. 119; State of Missouri v. Lewis, 101 U. S. 22, 31, 25 L. Ed. 989. Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A state may decide whether to have direct appeals in such cases, and if so under what circumstances. McKane v. Durston, 153 U. S. 684, 687, 14 S. Ct. 913, 915, 38 L. Ed. 867. In respecting the duty laid upon them by Mooney v. Holohan, the States have a wide choice of remedies. A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of habeas corpus or coram nobis. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or, it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention. See, e. g., New York ex rel. Whitman v. Wilson, 318 U. S. 688, 63 S. Ct. 840, 87 L. Ed. 1083; Matter of Lyons v. Goldstein, 290 N. Y. 19, 25, 47 N. E. 2d 425, 146 A. L. R. 1422; Matter of Morhous v. New York Supreme Court, 293 N. Y. 131, 56 N. E. 2d 79; People v. Gersewitz, 294 N. Y. 163, 168, 61 N. E. 2d 427; Matter of Hogan v. Court of General Sessions, 296 N. Y. 1, 9, 68 N. E. 2d 849. So long as the rights under the United States Constitution may

> be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated."

This view is entirely consistent with the accepted doctrine expressed in the case of *Mooney* v. *Holohan*, 55 S. Ct. 340, 294 U. S. 103, 79 L. Ed. 791, where the court said:

> "Orderly procedure, governed by principles we have repeatedly announced, requires that, when this Court is asked to issue a writ of habeas corpus, in the case of a person held under a state commitment, recourse should be had to whatever judicial remedy afforded by the State may still remain open."

CONCLUSION.

Nebraska recognizes the writ of error coram nobis. The Nebraska Constitution compels this state to provide a corrective judicial remedy to one wrongfully convicted. The Supreme Court of this state does not challenge the conclusion reached by the Supreme Court of the United States that the petitioner is entitled to an opportunity to prove his allegations. The inevitable result would seem to be then that until the writ of error coram nobis has been sought without avail, petitioner's state remedies have not been exhausted. Under the laws of this state, habeas corpus is not the proper remedy, and the petitioner's remedy, if he is entitled thereto, is provided by writ of error coram nobis. Petitioner must therefore exhaust his state remedies before a federal court may consider him entitled to relief on a petition of habeas corpus. The action of the Circuit Court of Appeals in affirming the district court's dismissal of the petition because of lack of jurisdiction was clearly

correct, and the application for a writ of certiorari should therefore be denied.

Respectfully submitted,

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